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No. 80-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE JOHNSON, III,
Petitioner,

v.

J.O.L., II,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR J.O.L., II, IN OPPOSITION

HAL WITT
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 828-8240
Counsel for Respondent

July 10, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4321

PARTIES TO THE PROCEEDING

Petitioner is Eugene Johnson, III. Respondent is J.O.L., II. The mother of the adoptees, referred to by petitioner as the "former wife" (Pet. *iii*), was not a party below.

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STATEMENT OF THE CASE

This case commenced on March 31, 1977, when respondent (petitioner below) filed a petition for adoption in the Superior Court of the District of Columbia, Family Division, seeking adoption by respondent of the adoptees. Respondent is married to the mother of the adoptees. Petitioner (respondent below) is the biological father of the adoptees.

Pursuant to D.C. Code §16-304(e), a full evidentiary hearing was held on May 24, 25 and 26, 1978. The trial court entered its memorandum opinion and order on August 3, 1978, granting the petition for adoption. Said

order was affirmed by the District of Columbia Court of Appeals on December 10, 1979, and petitioner's petition for rehearing *en banc* was denied on March 27, 1980. On July 10, 1980, petitioner filed with this Court his first petition for a writ of certiorari. The Court granted the writ on October 6, 1980.

On October 27, 1980, respondent filed with this Court a motion to dismiss the writ of certiorari and to remand the case to the trial court so that the adoption decree could be vacated. On November 6, 1980, petitioner filed an opposition to respondent's motion to dismiss. Respondent filed a brief reply to petitioner's opposition on November 13, 1980. On November 17, 1980, this Court vacated the judgment of the D.C. Court of Appeals and remanded the case for further consideration in light of the positions asserted by respondent in his motion to dismiss, petitioner's opposition and respondent's reply thereto. Petitioner's request for a rehearing on this Court's remand decision was denied on December 15, 1980.

Pursuant to this Court's November 17, 1980 remand decision, the D.C. Court of Appeals ordered the parties to file memoranda addressing the remand issue on or before January 5, 1981. The parties filed their memoranda as instructed, and petitioner subsequently suggested a hearing *en banc*. Upon consideration of the memoranda filed by the parties on the remand issue and the suggestion for hearing *en banc* filed by petitioner, the D.C. Court of Appeals remanded the case to the D.C. Superior Court with instructions to vacate the adoption decree. On March 10, 1981, the D.C. Court of Appeals, sua sponte, vacated its order dated February 9, 1981, which remanded the case to the trial court with instructions to vacate the adoption decree, and ordered the case

remanded to the trial court for such further proceedings as the circumstances of the case deem appropriate.

On June 8, 1981, petitioner filed with this Court his second petition for a writ of certiorari, which was received by respondent on June 10, 1981. Respondent hereby files his opposition to petitioner's second petition for a writ of certiorari in this case.

ARGUMENT

On November 17, 1980, this Court vacated the judgment of the District of Columbia Court of Appeals and remanded the case for further consideration in light of the positions set forth by the respondent in his motion to dismiss the writ of certiorari, the petitioner's opposition thereto and the respondent's reply to petitioner's opposition. Pursuant to this Court's remand decision, the D.C. Court of Appeals ordered both parties to prepare and file memoranda addressing the remand issue. Upon consideration of the positions set forth by the parties in their memoranda, the case was remanded to the Superior Court of the District of Columbia, where it is now pending.

Petitioner now asks this Court to intervene in the remand proceedings of the courts of the District of Columbia and to issue what would be, in effect, an advisory opinion as to the constitutionality of the statute involved in this case. Petitioner's request, at this procedural juncture, ignores a cardinal principle of constitutional law and the well-established policy of this Court to avoid premature and unnecessary adjudication of constitutional questions. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-75 (1947).

Petitioner complains that the D.C. Court of Appeals remanded the case to the trial court without first invalidating the challenged statute. Petitioner's suggestion

to the D.C. Court of Appeals for a hearing *en banc* presented a host of abstract hypotheticals which were not relevant to the remand proceeding then pending in the D.C. Court of Appeals pursuant to this Court's November 17, 1980 memorandum decision. Instead of engaging in speculation about hypothetical constitutional infirmities, the D.C. Court of Appeals focused on the memoranda submitted by the parties concerning the remand issue, strictly in accord with this Court's November 17, 1980 memorandum decision. Upon consideration of the parties' memoranda and in furtherance of this Court's remand decision, the D.C. Court of Appeals remanded the case to the Superior Court of the District of Columbia.

Respondent submits that the remand action of the D.C. Court of Appeals, about which petitioner now complains, was strictly in accord with this Court's November 17, 1980 memorandum decision, and that the D.C. Court of Appeals was under no obligation whatsoever to render any decision about the constitutionality of the challenged statute, as petitioner now contends. *See Leiss v. United States,* 364 A.2d 803 (D.C. 1976), *cert. denied,* 430 U.S. 970 (1977) (decisions of constitutional dimension should be made only as specifically required by the facts of an actual controversy).

This Court vacated the judgment of the D.C. Court of Appeals so that the case could be remanded to the Superior Court of the District of Columbia for further proceedings. The case is now pending in the D.C. Superior Court. The challenge raised by petitioner at this procedural stage seeks to short-circuit the remand proceedings initiated by this Court and would spur premature and unnecessary adjudication of hypothetical constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HAL WITT
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 828-8240
Counsel for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 1981, three copies of the foregoing Brief for J.O.L, II, in Opposition were personally served on Edward L. Genn, Esquire, 1319 - 18th Street, N.W., Washington, D.C. 20036, counsel for petitioner.

Hal Witt by PTS

Hal Witt
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 828-8240

Counsel for Respondent